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No. 89-258

Supreme Court, U
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

STATE OF CALIFORNIA,
By Its Attorney General,
JOHN K. VAN DE KAMP
Petitioner,

vs.

AMERICAN STORES CO., ALPHA BETA ACQUISITION CORP., AND LUCKY STORES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

JOHN K. VAN DE KAMP,
Attorney General
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MICHAEL J. STRUMWASSER
Special Assistant Attorney General
SANFORD N. GRUSKIN,
Assistant Attorney General
*H. CHESTER HORN, JR.,
LAWRENCE R. TAPPER,
Deputy Attorneys General
3580 Wilshire Boulevard
Los Angeles, Calif. 90010
Telephone: (213) 736-7515

November 16, 1989

**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) Bowne Co.

QUESTION PRESENTED

Whether divestiture is a form of injunctive relief under section 16 of the Clayton Act (15 U.S.C. § 26) available to district courts to remedy mergers violating section 7 of the Clayton Act (15 U.S.C. § 18).

LIST OF PARTIES

The petitioner is the State of California by its Attorney General, John K. Van de Kamp.

The respondents are American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc.

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In the
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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 872 F.2d 837. (Pet. App. A, pp. A1-A21.) The opinion of the District Court is reported at 697 F.Supp. 1125. (Pet. App. B, pp. B1-B25.)

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1989. Petitioner's timely petition for rehearing with suggestion for rehearing *en banc* was denied on July 3, 1989. (Pet. App. C.) California's petition for a writ of certiorari was timely filed on August 10, 1989. On August 22, 1989, the Court, per O'Connor, J. (in chambers), stayed the mandate of the court of appeals until disposition of California's petition or further order of this Court. California's petition was granted on October 16, 1989. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1982):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of any other corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 16 of the Clayton Act, 15 U.S.C. § 26 (1982):

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief. . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and

> principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

STATEMENT

On March 21, 1988, American initiated a hostile takeover bid for the Lucky supermarket chain with the intent of merging Lucky's operations in California with those of American's Alpha Beta Stores, Inc. ("Alpha Beta"), bringing under one management 592 California supermarkets. (Pet. App. A at A6.) Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act (HSR) (15 U.S.C. § 18a), American Stores gave notice of its intentions to the FTC. (Pet. App. A at A6.)

California immediately began an investigation of the Lucky acquisition. In mid-April, American Stores delivered some 72 boxes of documents and hundreds of pages of interrogatory responses comprising its HSR filing with the FTC to petitioner. (ER 594.) Petitioner retained three economists with national reputations as experts in retail food distribution to advise it concerning the competitive implications of American Stores' acquisition of Lucky (ER 30, 142, 153, 175, 600 and 990).

For more than two months, Lucky's management resisted American's hostile tender offer as inadequate. (ER 592-94.) But, on May 23, 1988, Lucky's board approved a merger of the two firms after American Stores increased its offer. (Pet. App. A at A6.) The FTC concluded that the merger, as proposed, would

violate section 7 of the Clayton Act (15 U.S.C. § 18) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). On May 31, 1988 -- only eight days after Lucky agreed to the merger -- the FTC issued an administrative complaint alleging substantial injuries to competition in the retail sale and distribution of food and grocery items in supermarkets throughout California. (ER 598Y-CC.)

Simultaneous with publication of the complaint, the FTC released a proposed consent agreement its staff had negotiated with American, proposing settlement of its complaint in exchange for American's agreement to comply with certain demands, including sale of 37 supermarkets in California. (Pet. App. A at A6-7.) The FTC solicited public comment on the proposed consent agreement pursuant to its regulations governing consent agreement procedures. (16 C.F.R §§ 2.31-2.34, 3.25.) The Commission entered into a Hold Separate Agreement with American requiring it to hold the operations of Lucky separate from those of Alpha Beta until the completion of the Commission's review of the proposed consent order, including review of the public comments required under the Commission's regulations. (Pet. App. B at B20-22.)

Petitioner repeatedly warned American that failure of the FTC to remedy California's concerns could result in an action under section 7. (Pet. App. B at B23.) American ignored the warnings and on June 2, 1988, just two days after the FTC opened its comment period, accepted for payment all of the tendered Lucky shares -- more than 94% of Lucky's outstanding stock. (ER

596.) On June 9, American Stores completed its acquisition of the Lucky stock by accomplishing a short-form merger under Delaware law. (*Ibid.*)

On July 22, 1988, petitioner filed timely comments with the FTC analyzing the substantial harm the Lucky acquisition threatened to California consumers and recommending withdrawal of the FTC's proposed consent agreement. (Pet. App. B at B23.) On August 31, 1988, the FTC gave final approval to the proposed consent order without addressing any of the concerns expressed by petitioner. (*Ibid.*)

Having concluded that the merger presented a serious threat to a vital California industry, petitioner filed this suit one day later on September 1, 1988. (*Ibid.*) The preliminary injunction was granted on September 29, 1988. (Pet. App. B at B1.) The preliminary injunction required American:

1. To take all steps necessary to operate American, Alpha Beta, and their respective subsidiaries, divisions and groups independently of the assets and businesses of Lucky in the State of California.

2. To refrain from taking any action to modify the September 6, 1988, status quo as to the California operations of Alpha Beta or Lucky other than in the ordinary course of business, and to refrain from taking any further steps to merge or integrate the assets and businesses of American's Alpha Beta California operations and those of Lucky's California operations. (*Ibid.*, at B25.)

Two of the district court's findings supporting this order require emphasis:

> (1) The District Court found that, even assuming compliance with the conditions imposed by the FTC's consent order, "the overwhelming statistical evidence has demonstrated a strong probability the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act." (Pet. App. B at B24.)
>
> (2) The District Court found that "unless the defendants are enjoined [from completing the merger of Lucky and Alpha Beta], the citizens of California will be substantially and irreparably harmed." (Pet. App. B at B24-25.)

In arriving at these conclusions, the District Court rejected respondents' argument that this merger was "completed" when the Lucky stock purchase was accomplished and found that the effect of the FTC's Hold Separate Agreement was to insure that Lucky and Alpha Beta "retain[ed] their separate names and with them their respective corporate identities." (Pet. App. B at B21.) But the District Court found that absent an injunction, American Stores could "restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent." (*Ibid.*) The District Court concluded that the preliminary injunction was necessary "to remedy effectively the unlawful merger." (*Ibid.*, at B22.)

On March 31, 1989, the Ninth Circuit affirmed the District Court's findings concerning the likelihood that California would prevail on its claim that this merger violates section 7 of the Clayton Act. (Pet. App. A at A8-15.) The Court of Appeals did not disagree that California had sustained its burden of proving the need for preliminary injunctive relief. (Pet. App. A at A16.) Nor did it dispute the District Court's conclusion that the injunction was necessary "to remedy effectively the unlawful merger." (Pet. App. B at B22.) However, the Court of Appeals held that the preliminary injunction ordered by the District Court was an abuse of discretion because "divestiture, whether direct or indirect, is not an available form of relief under section 16 of the Clayton Act for a private party such as California." (Pet. App. A at A19.)

The Court of Appeals reasoned that the preliminary injunction was designed to preserve the possibility of divestiture and itself amounted to "indirect divestiture" by ordering Lucky and Alpha Beta to operate separately in California. (Pet. App. A at A18-20.) In both respects, the Court said, the injunction contravened its earlier holding in *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) ("*IT&T*") that divestiture is not a remedy available under section 16. (Pet. App. A at A17-18.) Because the preliminary injunction was designed to preserve relief not available to California under the Ninth Circuit's previous interpretations of section 16 of the Clayton Act, the court struck it down as "overly broad." (*Ibid.*, at A20.)

On July 3, 1989, the Court of Appeals denied California's petition for rehearing. (Pet.App. C.)

On October 16, 1989, this Court granted California's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

Since divestiture is injunctive relief which will prevent threatened loss or damage, it is authorized by the plain language of section 16 of the Clayton Act. The Act places no restrictions on the power of district courts to provide effective relief. The absence of such restrictions is important because Congress knows how to place restrictions on section 16 relief when it intends to do so, as it expressly did in section 20 of the Clayton Act. The history of equitable remedies was known to Congress in 1914 and clearly included the flexibility to award divestiture if necessary to provide effective relief. The decision below is not consistent with the Court's jurisprudence concerning the rare circumstances when Congressional limits on the inherent equitable powers of the courts will be implied.

The purpose of section 7 of the Clayton Act was to arrest increasing concentration and stop the threat to competition that it posed. Section 16 must be interpreted consistent with that Congressional aim. Acquisition of Lucky by American Stores threatens the very harm section 7 was designed to prevent. That is why the District Court found that its preliminary injunction was necessary to preserve the possibility of effective relief.

The decision below is inconsistent with virtually all of the policies underlying section 7 and section 16 of the Clayton Act. They were designed to make the private action an effective weapon in the fight to preserve our nation's competitive economy. This Court's experience, and that of the lower courts, shows that divestiture is particularly appropriate in horizontal merger cases. Other forms of relief are rarely as effective.

The no-divestiture rule deprives the courts of the power to close important gaps in the merger enforcement program envisioned by Congress when it enacted the Hart-Scott-Rodino Act of 1976. Because the federal enforcement agencies are being overwhelmed by their HSR review responsibility, they are unable to close those gaps or challenge effectively all mergers raising section 7 concerns. Private parties, and especially state Attorneys General, can and do play an important role in the coordinated enforcement process Congress intended.

The legislative history of the Clayton Act shows that Congress intended to grant to the courts the same powers to provide effective relief in cases brought under section 16 that it gave the courts in cases brought by the government. Since there is no dispute that the government can secure the remedy of divestiture, it follows that private parties should have the same right.

ARGUMENT

I.

THE PLAIN LANGUAGE OF SECTION 16 AUTHORIZES DIVESTITURE TO REMEDY A VIOLATION OF THE CLAYTON ACT

Section 16 of the Clayton Act, 15 U.S.C. section 26, provides in part:

> "Any person . . . shall be entitled to . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity. . . ."

An injunction mandating divestiture of assets acquired in violation of section 7 of the Clayton Act is clearly injunctive relief that will prevent "threatened loss or damage by a violation of the antitrust laws." As the First Circuit held in finding that divestiture is available under section 16 to remedy violations of section 7, "[t]he statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order." (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, 754 F.2d 404, 416 (1st Cir. 1985).) As this Court has so often reminded, "Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of

that jurisdiction is to be recognized and applied." (E.g., *Brown v. Swann*, 10 Pet. 497, 503 [35 U.S. 331] (1836).)

Despite the expansive and unqualified language of section 16, the Ninth Circuit below held that the statute does not permit district courts to mandate the injunctive remedy of divestiture in cases brought under section 7. The court apparently believed that Congress' use of the phrase "injunctive relief" was somehow intended to limit the remedies available under section 16 in contrast to the supposedly broader language of section 15 of the Clayton Act, which even the Ninth Circuit concedes permits the remedy of divestiture. (*IT&T*, *supra*, at 924.) That conclusion, however, finds no support in the decisions of this Court or the history of equitable remedies. To the contrary, the Court has stressed that divestiture "should always be in the forefront of a court's mind when a violation of § 7 has been found." (*United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters v. United States*, 334 U.S. 110, 128 (1948).) This Court's insistence on preserving the full panoply of equitable powers available to district courts has also found clear expression in its decisions interpreting section 16 of the Clayton Act. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); accord, *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).)

A. Section 16 Confirms the District Court's Traditional Equitable Power To Order Whatever Remedies Are Needed To Provide Effective Relief

The whole history of the development of equitable powers suggests that the phrase "injunctive relief" in

section 16 of the Clayton Act includes whatever remedies are necessary to provide effective relief. The Restatement 2d, Torts (1979) makes the point succinctly:

> "Injunction is a flexible remedy, capable of adjustment to the peculiar needs of the plaintiff in the particular situation. It is not stereotyped. Indeed, *it is not a single remedy but an arsenal of remedies, affording both preventive and mandatory relief of an interlocutory or permanent character*." (Restatement 2d, Torts, § 938 at 573 (1979) (emphasis added).)

Congress was well aware of these principles when it passed the Sherman Act and the Clayton Act. (21 Cong. Rec. 113, 124-25, 51st Cong., 1st Sess. (March 21, 1890) (Sen. Sherman introducing S. 1, enacted as the Sherman act).) Congress was also aware of the array of remedies which the common law courts of England and the states had employed to deal with the trusts and other restraints of trade. (*Ibid.*; *Hornby v. Close*, L.R. 2 Q.B. 153, 158-59 (1867); *Farrer v. Close*, L.R. 4 Q.B. 602, 608-09 (1869) (contracts in restraint of trade void *ab initio*); *Mitchel v. Reynolds*, 1 P.Wms. 181, 190 (1711); *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 292-300 (1889).) Dissolution of these trusts was the remedy after declaring the agreements void. (*People v. Chicago Gas Trust Co.*, *supra*, 130 Ill. 268.) This was true whether the plaintiff was a state or a private party. (*Ibid.*; *West Va. Transp. Co. v. Ohio River Pipe Line Co.*, 22 W.Va. 600, 617-40 (1883).)

Indeed, this Court has recognized that independent of the powers expressly enumerated in a statute, the district courts possess inherent equitable authority to decree

effective relief. (*Hecht v. Bowles*, 321 U.S. 321, 329 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946); *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc.*, *supra*, 754 F.2d at 416.) This power reflects the "equity practice with a background of several hundred years of history." (*Hecht v. Bowles*, *supra*, 321 U.S. at 329.) "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility, rather than rigidity has distinguished it." (*Ibid.*)

Because "the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." (*Porter v. Warner Holding Co.*, *supra*, 328 U.S. at 399.) "Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command." (*Ibid.*)

As *Porter* acknowledges, Congress can and has placed restrictions on the scope of relief available under section 16. When it intends to do so, however, it does so expressly. The clearest example is found in section 20 of the Clayton Act (29 U.S.C. § 52), which restricts the power of the courts to issue injunctions affecting labor disputes. In *Duplex Co. v. Deering*, 254 U.S. 443, 471-72 (1921), the Court described this exception as follows:

> "[B]ut it must be borne in mind that the section *imposes an exceptional and extraordinary restriction upon the equity powers of the courts of the United States and upon the general operation of the anti-trust laws, a*

restriction in the nature of a special privilege or immunity to a particular class, with corresponding detriment to the general public; and it would violate rules of statutory construction having general application and far-reaching importance to enlarge that special privilege by resorting to a loose construction of the section, not to speak of ignoring or slighting the qualifying words that are found in it." (emphasis added.)

No such "special privilege" or "immunity" has been accorded to persons violating section 7 of the Clayton Act simply because they have completed their illegal acquisition.

The Ninth Circuit's decision below points to no "clear and valid legislative command" limiting the scope of injunctive relief under section 16. To the contrary, Congress confirmed the district courts' inherent equitable powers in broad, unqualified terms because only by reliance on the full remedial powers of the courts could the important objectives of the Sherman and Clayton Acts be realized.

B. Section 16 Must Be Read To Ensure The Availability Of Injunctive Remedies Necessary To Achieve The Objectives Of Section 7

Protecting consumers from the threat posed by firms amassing undue market power was the paramount concern of Congress in enacting section 7 of the Clayton Act. (*Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-97, 39 L.Ed.2d 530,

541-42, 94 S.Ct. 1186 (1974).) Its primary purpose was to arrest the trend toward economic concentration. (S. Rep. No. 698, 63rd Cong., 2d Sess. 1 (1914); Kintner, *Federal Antitrust Law*, § 40.1 (1984).) This Court has repeatedly recognized that section 7 must be interpreted to prevent anticompetitive acts, including mergers, in their incipiency. (*United States v. E.I. Du Pont De Nemours & Co.*, 353 U.S. 586, 589 (1957); *Brown Shoe Co. v. United States*, *supra*, 370 U.S. 294, 311-23; see also, *Note, Section 7 of The Clayton Act: A Legislative History*, 52 Col. L. Rev. 766 (1952).) The Congress expressly identified section 7 as one of the antitrust laws private parties were encouraged to enforce under section 16 of the act. (15 U.S.C. § 26: Note, *Divestiture as a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986).) Thus, the overriding goal in construing section 16 must be to insure that the available remedies will effectively achieve the congressional purpose in enacting section 7. (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, *supra*, 395 U.S. 100, 130-31.)

If section 16 is to carry out Congress' clear intent, it cannot be read to exclude the very remedies which are most likely to prevent the harm threatened by horizontal mergers violating section 7. (*United States v. E.I. Du Pont De Nemours & Co.*, *supra*, 366 U.S. 316, 331 (1961).) Yet that is precisely what the Ninth Circuit's no-divestiture rule does. (*International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp. (IT&T)*, *supra*, 518 F.2d 913, 920 (9th Cir. 1975). As leading commentators have noted:

"To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.

"Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.*" (2 P. Areeda & D. Turner, *Antitrust Law*, 328b (1978) (emphasis added).)

The Lucky merger threatens California consumers with substantial and irreparable harm of precisely the type sections 7 and 16 of the Clayton Act were designed to prevent. (Pet.App. A at A8-A14 & A16; Pet.App. B at B24-B25.) Prior to this acquisition, Lucky was the largest and one of the most successful supermarket chains in California (ER 350-59), the acknowledged low-price leader among California's supermarket operators. (*Ibid.*) Alpha Beta was the fourth largest chain. (ER 616.) American's acquisition of Lucky will create an entity collecting one out of every four supermarket dollars spent by California consumers. (*Ibid.*)

In 53 of the 62 relevant geographic markets American and the next-largest chain will control over 50% of the volume, in one geographic market as much as 84%.

(ER 691-95, 669.)[1] This culminates a fifteen-year trend toward ever-increasing concentration that has resulted in a 50% increase in the number of geographic markets in California which are highly concentrated. (Pet. App. B at B14.) Since 1982, the relevant geographic markets suffered an average increase in concentration of more than 30%, before this merger. (*Ibid.*)

These facts led the District Court to conclude that "overwhelming statistical evidence [demonstrates] a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act." (Pet.App. B at B24.) The District Court concluded that the preliminary injunction maintaining Alpha Beta and Lucky as separate competitive entities was necessary because "if preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be

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1. These figures assume compliance with the FTC consent order. As measured by the Herfindahl-Hirschman Index (HHI), 87% of the relevant geographic markets would exceed the 1800-point definition of "highly concentrated" employed by the U.S. Department of Justice. (*U.S. Department of Justice Merger Guidelines*, 49 Fed.Reg. 26,823 (June 29, 1984) reprinted in 2 Trade Reg. Rep. ¶ 4490.) The same threshold is used by the state Attorneys General. (*National Association of Attorneys General, Horizontal Merger Guidelines* (1986) reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,405 (1987).) In one market, the post-merger HHI is 4352; in another 3224. (ER 668-69.)

The parties used different geographic market definitions resulting in differing measures of the impact of this merger. The District Court found it unnecessary to resolve that dispute because it found the effects of the merger to be substantial even assuming American's definition of the relevant geographic markets. (Pet.App. B at B11-B14.)

extremely difficult, if at all possible, to remedy effectively the unlawful merger." (Pet.App. B at B22.)

Absent express language to the contrary, section 16 must be read to permit the lower courts the use of this most natural and effective form of injunctive relief.

II.

THE NO-DIVESTITURE RULE CONFLICTS WITH THE POLICIES OF THE CLAYTON ACT

"The Sherman Act was enacted unanimously in 1890 to protect the national economy from the pernicious effects of regulation by private cartel and to vest the federal courts with jurisdiction adequate to 'exert such remedies as would fully accomplish the purposes intended.'" (*Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 649 (1977) (Stevens, J., dissenting).) However, the Sherman Act did not expressly outlaw corporate acquisitions threatening competition, nor did it provide injunctive remedies to private litigants.[2] The Clayton Act corrected both oversights.

The primary aim of section 7 of the Clayton Act was to prevent firms from acquiring or enhancing their market power by merger. (A. Fisher & R. Lande, *Efficiency*

2. The Sherman Act did, of course, create the treble-damage remedy for the primary purpose of enlisting the aid of private litigants to serve "the high purpose of enforcing the antitrust laws." (*United States v. Borden, supra*, 347 U.S. 514, 518.)

Considerations in Merger Enforcement, 71 Cal. L. Rev. 1580, 1588 (1983).) Both the Sherman Act and the Clayton Act were intended to prevent unfair transfers of wealth from consumers to firms exercising market power. (*Albrecht v. Herald Co.*, 390 U.S. 145, 153 (1967); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339-43 (1979); R. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 Hast. L. J. 65, 83 (1982).) The Clayton Act, in particular, "was framed largely with a view to making more effective the remedies given by the Sherman Law." (*FTC v. Gratz*, 253 U.S. 421, 434 (1920) (Brandeis, J.).) The Ninth Circuit's decision here undermines virtually all of these policies.

A. Divestiture Has Long Been Recognized As The Surest Remedy For Mergers Violating Section 7

Courts and commentators agree that divestiture is the most effective remedy for accomplishing the congressional objectives of section 7 of the Clayton Act.[3] Where a

3. *United States v. E.I Du Pont De Nemours & Co., supra*, 366 U.S. 316, 331; *Schine Chain Theaters v. United States, supra*, 334 U.S. 110, 128; *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d 404 (1st Cir. 1985); Kintner, *Federal Antitrust Law*, V:40.32, n.963 (1984); P. Areeda & D. Turner, *Antitrust Law*, § 328b (1978); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act*, 49 Minn. L. Rev. (1964); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act*, 48 Tex. L. Rev. 54 (1969); Note, *The Use of Divestiture in Private Antitrust Suits*, 43 Geo. L. Rev. 261 (1974); Note, *Divestiture As a Remedy in Private Actions Brought Under Section 16 of the Clayton Act*, 84 Mich. L. Rev. 1579 (1986); and Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief*, 19 Pac. L. J. 143 (1987).

merger or stock acquisition violating section 7 is already completed, divestiture is the only remedy which completely addresses the violation and its threatened injury by eliminating the increase in concentration. (*Schine Chain Theaters v. United States*, *supra*, 334 U.S. at 128.) That is why this Court has said:

> "[D]ivestiture or dissolution is an essential feature of these decrees. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act." (334 U.S. at 128-29.)

While *Schine* was a case brought under the Sherman Act, the Court reiterated the importance of divestiture to accomplish the goals of section 7 of the Clayton Act in *Du Pont*:

> "The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control, and it is reasonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved . . . . Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind

> when a violation of § 7 has been found." (366 U.S. at 328-31.)

The decision below precludes the District Court from even considering divestiture in this case in the event it ultimately determines that this merger violates section 7. Thus, the District Court will not be able to "put an end to the violation," "deprive the antitrust defendants of the benefits of their violation," or "render impotent" the monopoly power the acquisition confers on American Stores. In short, the Ninth Circuit has deprived the District Court of the power to accomplish any of the purposes this Court has found essential for section 7 relief.

B. Remedies Short of Divestiture Rarely Provide Complete Relief Against The Harm Caused By Horizontal Mergers

The Ninth Circuit has precluded the District Court from providing relief addressing the structural nature of section 7 violations -- with the additional gloss that such relief must be directed only at the "symptoms" of the violation. (Pet. App. A at A20.)[4] But whatever those

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4. The Ninth Circuit has never said what acceptable "symptomatic" relief might look like. The "symptoms" of a horizontal merger violating section 7 are 1) increased concentration and 2) the resulting increase in market power enabling the merged firm to raise prices. (Kintner, *Federal Antitrust Law*, §§ 40.1-40.4 (1984).) Without divestiture, an injunction precluding American Stores from opening new supermarkets in affected geographic markets should reduce concentration over the long run, as other firms add stores or new entrants emerge. But, there is no guarantee that this will

remedies are, they carry little hope of providing the relief necessary to prevent the harm threatened by this and other completed acquisitions violating section 7. Indeed, the experience of this Court and the lower courts with relief short of divestiture has been one of frustrating the goals underlying section 7 rather than implementing them. The simple fact is that failing to address the cause of the threatened harm cannot effectively prevent that harm from occurring. Thus, the Ninth Circuit's holding is a prescription for ineffectiveness, the reverse of the touchstone of this Court's equity jurisprudence -- effective relief.

The divestiture remedy is considered so critical to section 7 relief that this Court has on several occasions found it necessary to reverse lower court decrees which did not include divestiture of the unlawfully acquired firm or assets. In *United States v. E.I Du Pont De Nemours & Co., supra*, 366 U.S. 316, for example, the Court not only reversed a district court decree for failure to order divestiture of stock acquired in violation of section 7 of the Clayton Act, but took the unusual step of itself directing a divestiture decree. (366 U.S. at 334.)

> "It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7. That statute is specific and 'narowly

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happen. Because the success or failure of this relief depends on the actions of parties not before the court, the court cannot ensure that such an injunction would actually reduce concentration. Short of an order regulating Lucky's prices, it is difficult to imagine remedies that would prevent American Stores from raising prices, if the Lucky acquisition has conferred on it the power to do so.

> directed' [citation omitted] and it outlaws a particular form of economic control - stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy." (366 U.S. at 328-29.)

In *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968), the Court found it necessary to direct the District Court to enter a decree eliminating the effects of the defendant's monopoly immediately, after earlier remedies had failed to accomplish that goal. The district court had decreed relief short of divestiture over government objections in an opinion affirmed by this Court. (*United States v. United Shoe Machinery Corp.*, 110 F.Supp. 296 (D.Mass. 1953), affd. *per curiam* 347 U.S. 521 (1954).) After the government concluded that the original decree had not restored competition to the market affected by the defendant's unlawful behavior, it requested and the district court again refused to decree divestiture of the acquired firm. (*United States v. United Shoe Mach. Corp.*, 266 F.Supp. 328 (D.Mass 1967).) This Court reversed, however, after sustaining the government's claim that the district court abused its discretion by failing to decree divestiture. (391 U.S. 244 (1968).)

The Court's experience in these cases is mirrored in many decisions of the lower courts. In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1276-77 (E.D.Pa. 1987), the Court evaluated alternatives to divestiture in a case filed prior to consummation of the acquisition as part of the determination whether preliminary injunctive relief was necessary. The Court concluded that a hold-

separate order was necessary because divestiture was the only means of insuring effective relief after trial. (*Id.*, at 1277.)

In *FTC v. PPG Industries, Inc.*, 798 F.2d 1550 (D.C.-Cir. 1986), the Court of Appeals reversed a District Court order permitting an acquisition to take place, subject to a stringent hold-separate order, on the ground that even the hold-separate order was insufficient to prevent competitive harm from occurring while the case was being tried. (798 F.2d at 1508-09.) Instead, the Court of Appeals directed the District Court to enjoin the merger. (*Id.*, at 1509.)

These cases highlight the problems with the Ninth Circuit's decision here. As in *Tasty Baking* and *PPG Industries*, the District Court here concluded that California is likely to prevail on the merits of its claim that the Lucky acquisition violates section 7 of the Clayton Act, and that the merger will cause irreparable harm if allowed to proceed unchecked. (Pet. App. B at B24-25.) Under these circumstances, the surest means of addressing the violation and preventing the antitrust injury it poses is the remedy of divestiture. (*United States v. E.I. Du Pont De Nemours & Co.*, *supra*, 366 U.S. at 331.) Yet, the Ninth Circuit's holding bars that relief or any other seeking to restore the pre-violation competitive conditions.

C. The No-Divestiture Rule Undermines The Private Action As A Mechanism To Enforce Section 7

Section 7 of the Clayton Act outlaws mergers which may tend to substantially lessen competition. (15 U.S.C.

§ 18.) Sections 15 and 16 of the Clayton Act empower the courts to prevent or restrain violations of section 7 at the request of the government or private parties, respectively. (15 U.S.C. §§ 25, 26.) To increase the governments' ability to prevent violations of section 7, the Hart-Scott-Rodino Act (HSR) (15 U.S.C. § 18a) was enacted to provide the government with information about the competitive effects of the largest mergers before they occur. (*H.Rep. No. 94-1373*, 94th Cong., 2d Sess. 11, *reprinted* in 1976 U.S. Code Cong. & Admin. News 2637 ("H.Rep. No. 94-1373").) The intent of Congress was to create a comprehensive enforcement scheme relying on complementary efforts of the government and its citizens. (*Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 130-31.) The decision below undermines the congressional purpose of insuring the effectiveness of the private action. (*Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("The purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws.").)

Section 16 was designed to ensure that private parties could fill gaps in the federal antitrust enforcement effort. (*Reiter v. Sonotone Corp.*, *supra*, 442 U.S. 330, 344; *United States v. Borden*, 347 U.S. 514, 518-19 (1954) ("These private and public-actions were designed to be cumulative, not mutually exclusive."); *Lieberman v. F.T.C.*, 771 F.2d 32, 33 (2d Cir. 1985); *Arvin Industries, Inc. v. Maremont Corp.*, (S.D.Ind.) 1973 Trade Cases ¶74,416.) This Court has long recognized the appropriate role that

state attorneys general play in antitrust enforcement.[5] (*Georgia v. Pennsylvania Ry. Co.*, 324 U.S. 439, 447 (1945); *Hawaii v. Standard Oil Co. of California*, 405 U.S. 251, 259 (1972).) And the Congress has reiterated its views of the importance of actions brought under section 16 by specifically amending that section to provide attorneys' fees to prevailing plaintiffs, including state plaintiffs, for the express purpose of making such actions more attractive. (*H.Rep. No. 94-499, 94th Cong., 2d Sess.* 20, *reprinted in* 1976 U.S. Cong. & Admin. News 2572, 2589-90.)[6]

The HSR Act while improving the federal agencies' abilities to enforce section 7 with its premerger review

5. One of the great ironies of this case is the fact that a sovereign State acting in its *parens patriae* capacity is considered a "private" party under section 16. The State of California shares none of the characteristics which have led some courts to note that private litigants acting in the role of "private attorney general" often promote their "private" aims over those of the public interest. (*Grumman Corp. v. LTV Corp.*, 665 F.2d 10, 11 (2d Cir. 1981).)

6. Significantly, the House Judiciary Committee Report to the Congress concerning this amendment to section 16 noted:

> "In addition to private parties, States would be entitled to recover reasonable attorneys fees whenever they prevail in §16 cases." (*Id.*, at 2590.)

Clearly, Congress knew that section 7 was one of the provisions of the Clayton Act it was encouraging states to enforce by providing attorneys fees to them should they prevail in cases brought under section 16. It is not credible to assume that the Congress was encouraging states to bring cases which it understood could not result in effective relief.

provisions, was not intended to supplant the coordinate role Congress clearly envisioned for the private action. (*Lieberman v. FTC, supra*, 771 F.2d 32, 37 (2d Cir. 1985); *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 130-31.) The HSR Act itself created certain gaps in the enforcement scheme created by Congress because its threshold provisions were enacted with the knowledge that many mergers raising section 7 concerns would escape premerger review. (*H.Rep. No. 94-1373* at 11.) Moreover, parties can and do structure transactions to avoid the reporting requirements of the HSR Act. (*FTC v. Illinois Cereal Mills, Inc.*, 691 F.2d 1131 (N.D.Ill. 1988).) Filling these gaps is precisely the role Congress intended for section 16 and state attorneys general have consistently tried to carry out that congressional goal.

1. *The No-Divestiture Rule Leaves Important Gaps In the Enforcement Of The Antitrust Laws*

The federal enforcement agencies engage in HSR Act premerger reviews only with respect to mergers meeting the threshold requirements of that act.[7] (15

7. From 1979 through 1987, the two federal agencies conducted HSR reviews of transactions totalling only 55% of the number of mergers and acquisitions which actually occurred. (Compare, *Mergerstat Review 1988*, W.T.Grim & Co. (1989) at 117 (hereafter "*Mergerstat Review*") with Federal Trade Commission, *Tenth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1986, Pub. L. 94-435 ("Tenth Annual Report")*, Appendix A (1988).) Since the HSR Act requires certain transactions to be reported which are not either a merger or an acquisition, e.g., certain stock acquisitions of less than a majority interest, it is clear that even a smaller percentage of mergers is actually reviewed by the Antitrust Division or the FTC.

U.S.C. § 18 (b).) Congress knew that it was leaving open the possibility that "smaller, illegal mergers may still be consummated . . . and there may still be lengthy divestiture trials in future years." (*H.Rep. 94-1373, supra*, at 11.) The HSR Act was seen only as "a step in the right direction." (*Ibid.*) To the extent that such mergers escape the attention of the Antitrust Division and the FTC, the private action was intended to provide the primary source of potential relief from the anticompetitive consequences of such mergers.

The likelihood that the federal enforcement agencies would challenge a merger under section 7 that does not meet the thresholds of the HSR Act is quite low due to their limited resources and the existing burden of dealing with their premerger review obligations. Thus, particularly as standing or other jurisprudential limits on the ability of competing firms or target firms to challenge such mergers expand, the need for private actions by consumers and their representatives, such as state attorneys general, to serve as a check against such mergers increases.[8] (See, *Monfort of Colorado, Inc. v.*

8. The states have been vigorous in their response to this need. (E.g., *State of Texas v. Coca Cola Bottling Co. of Southwest Texas*, 697 S.W.2d 677 (1985) (state action to divest acquisition violating state law counterpart to § 7 of the Clayton Act where no prior HSR review by federal agencies); *State of Texas v. Gearhart Industries, Inc. Halliburton Company and Halliburton Acquisition Co.*, No. 88-49584 (127th Judicial District, Harris County) (state law challenge to action after DOJ HSR review resulted in no action); *Maine v. Connors Ltd.*, No. CV-88-318 (Maine Super. Ct., Kennebec County), 55 Antitrust & Trade Reg. Rep. (BNA) 524 (Sept. 29, 1988) (state law action where HSR thresholds not met resulting in divestiture consent agreement); *New York v. Transit-Mix Concrete Corp.*, 84 Civ. 4194

Cargill, Inc., 479 U.S. 104, 107 (1986); Note, *Competitor Standing to Challenge a Merger of Rivals: The Applicability of Strategic Behavior Analysis*, 75 Cal. L. Rev. 2057 (1987).)

When it passed the HSR Act, Congress was also aware that transactions could be structured to avoid its requirements. That is why Congress provided substantial civil penalties as sanctions for failing to comply with the act's reporting requirements. (15 U.S.C. § 18a (g).) Experience under the act shows that parties can and do attempt to avoid the reporting obligation for the purpose of "sneaking" their mergers through without antitrust scrutiny. (*F.T.C. v. Illinois Cereal Mills, Inc., supra,* 691 F.Supp. 1131, 1146-47; cf. *Koppers Co., Inc. v. American Exp. Co.*, 689 F.Supp. 1371 (1988); *USG Corp. v. Wagner & Brown*, 689 F.Supp. 1483 (N.D.Ill. 1988).) In such cases, the private action could and should serve as a deterrent to such unlawful behavior. But the Ninth Circuit's no-divestiture rule lets firms violating the HSR Act keep the spoils of their intentionally illegal acts.

(S.D.N.Y.) (state action under Clayton Act seeking divestiture and dissolution of local concrete monopoly where no prior HSR review); *City of Pittsburgh v. May Department Stores Co.*, 1986-2 Trade Cases (CCH) ¶ 67,304 (W.D.Pa. 1986) (state and city action resulting in divestiture of local store following FTC no action decision).) Under the Ninth Circuit's no-divestiture rule, the states would be foreclosed from effective relief in these actions.

2. *The Federal Enforcement Agencies Are Being Overwhelmed By Their HSR Act Premerger Review Responsibility*

The Ninth Circuit's decisions below and in *IT&T* preclude private litigants and state Attorneys General from effectively enforcing section 7 of the Clayton Act. This effect of its ruling is especially harmful because the federal enforcement agencies are increasingly unable to provide consumers with the protection they need due to the flood of merger activity overwhelming their limited resources. Thus, the congressional aim to have private litigants supplement the federal enforcement effort is frustrated by the Ninth Circuit's holding at the worst possible time.

The number of transactions requiring HSR review is increasing at an alarming pace,[9] as is the number of mergers and hostile tender offers.[10] At the same time, the percentage of mergers challenged by the federal

9. In 1987, the number of transactions reported (2533) increased by 30% over the number reported in 1986 (1949), which in turn represented a 22% increase over the number reported in 1985 (1603). (*Tenth Annual Report* at 4.)

10. The total dollar-volume of all mergers increased more than ten-fold between 1976 and 1988. (*Mergerstat Review, supra*, at 117.) In 1976 the dollar-volume of all reported acquisitions was approximately $20 billion. (*Ibid.*) By 1988, the figure had climbed to almost $250 billion. (*Ibid.*) The number of hostile takeovers tripled. (*Mergerstat Review* at 85.)

enforcement agencies has fallen precipitously.[11] This is, in part, attributable to the steep decline in the resources available to the Department of Justice and the FTC.[12]

The response of the Justice Department and the FTC to the pincer-like pressure created by the decrease in funding and increase in workload has been to modify the HSR reporting regulations, reducing both the number of transactions requiring HSR review and the amount of information received regarding those transactions. (*Tenth Annual Report*, at 5-7.) In this way, it is hoped that "the burden of the premerger notification program" can be reduced. (*Id.*, at 6.) In light of these trends, the number of mergers raising section 7 concerns which are not

11. The two enforcement agencies took action, either initiating suits or announcing their intent to do so, in 15 cases in 1987, approximately .5% of all reported transactions. (*Tenth Annual Report* at 15-20.) This represents a 50% decrease in the percentage of mergers the federal enforcement agencies were able to challenge as recently as 1979, with no evidence that the number of mergers raising section 7 concerns decreased.

12. Between 1980 and 1986, the Antitrust Division's budget declined by 30% in constant dollars (*House Oversight Hearings* at 145), while the number of attorneys declined by 40%. (*Ibid.*) The figures for the FTC are comparable. The Commission's budget declined by 32% in constant dollars (1982) between 1976 and 1988. (Compare, *Budget of the United States, 1990* at 9-168, Office of Management and Budget, Wash. D.C., (1989) with *Budget of the United States, 1978* at 343, Office of Management and Budget (1977).) The number of full-time permanent positions authorized for the Commission declined by more than 43% between 1976 and 1988, from 1638 to 922. (Compare, *Budget of the United States, 1990* Appendix I at 242 with *Budget of the United States, 1978* Appendix at 734.) Further cuts in staffing were implemented for the 1989 and 1990 fiscal years. (Budget of the United States, 1990 Appendix I.)

challenged by either the Antitrust Division or the FTC will inevitably increase.

Another byproduct of the increasing federal workload under the HSR is the greater reliance placed on administrative consent agreements such as the one entered in this case.[13] While the Antitrust Penalties and Procedures Act ("APPA") (15 U.S.C. § 16 (b)-(h)), provides for judicial review of consent agreements entered into by the Department of Justice, section 16 is the only mechanism for reviewing consent agreements entered into by the Commission. Unless divestiture is available under section 16, private litigants and the courts will be deprived of the opportunity to secure the most effective relief by non-reviewable Commission action. As the District Court's findings in this case show, that result poses genuine difficulties for courts whose mandate under section 16 is to provide effective relief "'conditioned by the necessities of the public interest which Congress has sought to protect.'" (*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969).)

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13. California is not suggesting that this policy is inappropriate. Prosecuting agencies need practices designed both to encourage settlement and preserve relief in the event settlement discussions break down. This is especially true in the case of hostile tender offers. The HSR Act waiting period, 15 U.S.C. § 18a (b), was designed to coordinate with the waiting period of the Williams Act, 15 U.S.C. §§ 78l(i),78m(d), (e), 78n(d) to (f). The Commission's consent agreement regulations serve to protect the interests Congress sought to protect in that Act as well. But the policy interferes with antitrust enforcement due to the no-divestiture rule and the increase in merger activity.

In short, the gap between merger activity and the ability of the federal enforcement agencies to enforce section 7 of the Clayton Act highlights the need for effective remedies in private actions, because the private action will have to play an increasing role if Congress' vision of a coordinated and effective enforcement program is to be achieved.

This case shows how the private action could supplement effectively the federal enforcement agencies' merger program but for impact of the no-divestiture rule. California informed the FTC that it believed the tentative consent agreement negotiated between its staff and American Stores was inadequate to remedy the competitive concerns raised by this merger. (Pet. App. B at B23.) In its comments, California presented substantial evidence to the Commission that the merger would dramatically increase concentration and threaten increased prices, notwithstanding the relief proposed by the tentative consent agreement. Accordingly, California recommended that the Commission withdraw its consent and seek to block the merger completely. (Pet. App. B at B23.) When the Commission approved the consent order unchanged by any of the public comments, this suit was filed the next day. (*Ibid.*) Both lower courts agreed that the evidence presented by California shows a likelihood that this merger, even with the Commission's consent order, violates section 7 of the Clayton Act. (Pet. App. A at A8-15; Pet. App. B at B24-25.)

California's experience in this case is not unique.[14] Other private parties have found it necessary to file under section 16 in order to obtain relief to remedy violations of section 7, notwithstanding the HSR review process. *State of Texas v. Gearhart Industries, Inc., Halliburton Company and Halliburton Acquisition Co., supra*, No. 88-49584 (127th Judicial District, Harris County); *City of Pittsburgh v May Department Stores Co., supra*, 1986-2 Trade Cases (CCH) ¶ 67,304 (W.D.Pa. 1986). Likewise, private litigants are often able to obtain modification of consent agreements negotiated by the Antitrust Division under the judicial review provisions of the APPA. (E.g., *United States v. BNS, Inc.*, 858 F.2d 456 (9th Cir. 1988); *United Sates v. Western Elec. Co., Inc.* 797 F.2d 1082, 1085 (D.C. Cir. 1986).) But the APPA applies to the Commission only when it seeks to settle cases it initiated in the district courts, and that is a rare occurrence. The Commission settles most of its merger cases by administrative consent agreement, so judicial review under the APPA will not occur.

In the great majority of circumstances then, section 16 of the Clayton Act provides the only avenue for private parties to challenge and for district courts to review, the effectiveness of the remedy secured by the Commisssion's consent agreement. (Cf., *United States v. Borden Co.*,

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14. Although not unique, California's concerns are acute. California is the merger capital of the United States. More firms headquartered in California have been acquisition targets than in any other state in every year since 1984. (*Mergerstat Review* at 110.) The number of California firms purchased by acquisition was more than 50% greater than the number two state (New York) during those years. (*Ibid.*)

supra, 347 U.S. 514; *Arvin Industries, Inc. v. Maremont Corp.*, (S.D.Ind. 1973 Trade Cases ¶ 74,416.) Without the divestiture remedy, the courts will be deprived of the ability under section 16 to order the relief that might be necessary to address the concerns raised by mergers violating section 7. In effect, the Antitrust Division and the FTC will have become the final arbiters of which mergers violating the Clayton Act require effective relief, whereas the Congress placed that responsibility squarely on the shoulders of the courts. (15 U.S.C. § 25.)

D. The Ninth Circuit Rule Undermines The Coordination Between Federal And Private Enforcement Efforts Congress Intended Under Section 7 Of The Clayton Act

Congress intended the private action and the federal enforcement program to serve complementary roles in enforcing section 7 of the Clayton Act. (*United States v. Borden, supra*, at 518-19.) Congress intended for private actions to serve as a check on, and fill gaps in, the federal enforcement efforts. (Cf. *Lieberman v. FTC, supra,* 771 F.2d at 33.) By the same token, however, Congress intended that private actions would supplement the federal program, not replace it. Yet, the Ninth Circuit's holding below will have just that perverse effect, since it forces private litigants to ignore the HSR premerger review to insure their right to effective relief. (Pet.App. A at A20-21.)

To the extent that the HSR review process effectively blocks anticompetitive mergers, federal policy and common sense suggest that it should be the principal

screen for such mergers. Litigation by either of the federal antitrust agencies, or by private litigants, is far more costly and disruptive to both the parties' resources and those of the courts. The no-divestiture rule, however, forces litigants to choose between the risk of not securing effective relief against threatened injury and the expense of initiating suit before mergers are completed. In most cases, that will not be a real choice -- private litigants will have to sue early, because the HSR review process results in such a small percentage of court actions. Thus, the no-divestiture rule can be expected to result in precipitous filings of section 7 cases, forcing district courts to duplicate the HSR review process being undertaken by the enforcement agencies.[15]

Both lower courts here recognized this problem. The District Court concluded that California had chosen the more responsible course by awaiting the results of the Commission's HSR review in the hope that it would resolve the competitive concerns raised by the Lucky acquisition. (Pet.App. B at B23-B24.) The Ninth Circuit ignored that finding and opined that California could have and should have sued earlier. (Pet.App. A at A20-A21.) That conclusion ignores the practical reality of meeting the burden of proof for a preliminary injunction in a section 7 case. Addressing the reality of that burden in government cases was, of course, the whole point of the

15. Another unfortunate aspect of this result is that private litigants may be forced to sue before they can thoroughly examine the real risk of antitrust injury posed by any particular merger. This is especially true in the case of tender offers, where the time frame for action is very short.

HSR Act. Forcing private litigants to forego the benefits of that act at the risk of losing the possibility of effective relief serves no antitrust purpose.

III.

THE LEGISLATIVE HISTORY OF SECTION 16 DOES NOT JUSTIFY THE NO-DIVESTITURE RULE

Despite the overwhelming evidence from the language and purpose of section 16 of the congressional intent to provide private parties with a divestiture remedy, the Ninth Circuit concluded that section 16 did not include such a remedy based on its analysis of excerpts from the legislative history of the Clayton Act. (*IT&T, supra*, at 920-26.) Significantly, the First Circuit reached the opposite conclusion -- that divestiture is a permissible remedy -- after an exhaustive analysis of that same history. (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d at 413-30.) Not only is the First Circuit's reasoning more persuasive, but its conclusion is buttressed by confirming evidence, apparently not presented to either court of appeals, that Congress intended to grant private litigants the very same injunctive remedies in section 16 it had given to the government in section 15 of the Act.[16]

16. Neither the First Circuit nor the Ninth Circuit considered this part of the floor debates in their opinions. Senators Shields and Nelson were sponsors of HR 15657 in the Senate. These excerpts occurred during debates in the Senate sitting as a Committee of the Whole. (51 Cong. Rec. 14100, Aug. 25, 1914.)

Shortly before passage of the Clayton Act, the following exchange occurred on the Senate floor between sponsors of the bill explaining its provisions to the full Senate:

> Mr. SHIELDS. I trust that the Senator will give attention to the provisions relating to injunctions when we reach those sections.
>
> . . . .
>
> Mr. NELSON. I desire to call to the attention of the Senator from Tennessee, . . . to the fact that under the original antitrust act of 1890 only the Government, through its Attorney General and the district attorneys, can obtain injunctive relief. By section 14 [enacted as section 16] of this bill for the first time the same remedy is given to private parties as was given to the Government under the antitrust laws. If that is the case, if private parties are to be given the same relief by injunctive process under the antitrust law as is the Government, why should they not have the same remedies in respect to contempt as the Government of the United States has under like circumstances?
>
> Mr. SHIELDS. I think all parties should have the same protection from the courts of the country. (51 Cong. Rec. 14214, Aug. 25, 1914.)

Senator Shields went on to provide the Senate with a section by section analysis of the proposed Clayton Act and as to the private injunction remedy, noted:

> "Section [16] authorizes persons and corporations to bring suits in equity against those violating the antitrust laws in all things, as section 4 of the Sherman Law authorizes the Government to do so." (51 Cong. Rec. 14215, Aug. 25, 1914.)

Significantly, section 4 of the original Sherman Act was reenacted as section 15 of the Clayton Act. Thus, Sen. Shields' recognition that Congress intended to give private litigants the same remedy found in section 4 of the Sherman Act disposes of the argument that the minor differences between the language of sections 15 and 16, support a no-divestiture rule. (See, e.g., *Respondent's Brief In Opposition*, filed in this case on September 20, 1989, at 19.)

Against these unequivocal descriptions of the Congressional intent, the Ninth Circuit concluded that differences between the phrases "dissolution", "divorcement", "divestiture", and "injunctive relief," coupled with the remarks of one Congressman during the first week of hearings on the Clayton Act, were dispositive of Congress' intent not to permit private litigants the divestiture remedy.[17] (*IT&T*, *supra*, 518 F.2d at 922-24.) By contrast, the First Circuit concluded that no definitive indications of congressional intent could be drawn from the legislative

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17. The Ninth Circuit reasoned that the term "dissolution" was broader than and included the term "divestiture." (*IT&T, supra*, at 922-23.) It argued that both terms described relief distinct from "injunctive relief." (*IT&T, supra*, at 922.) From these premises, the court concluded that Congress would have used a broader term than "injunctive relief" if it had intended to grant private parties the right to seek divestiture. (*Ibid.*)

history on that score. (*CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra,* 754 F.2d at 419-422.)

The Ninth Circuit placed great weight on the following remark of Rep. Floyd concerning the intent of the subcommittee which drafted HR 15657:

> "We did not intend by section [16] to give the individual the same power to dissolve the corporation that the Government has . . . . We discussed it very thoroughly among ourselves and decided he should not have [it]." (H. Hearings on HR 15567, 63rd Cong., 2d Sess. 842 (February 6, 1914).)

However, having failed to mention the clear statements of Sens. Nelson and Shields during the floor debates in the Senate which occurred later, the Ninth Circuit's dispositive treatment of Rep. Floyd's remarks are suspect.[18] Later references to inquiries by other

18. This is particularly so because Rep. Floyd's remarks occurred at the outset of the hearing process and months before the draft of H.R. 15657 was even reported out of the Judiciary Committee of the House on May 16, 1914. (*H. Rept. No. 627*, 63rd Cong., 2d Sess. (1914).) The version of the bill that was ultimately passed by the House was then substantially amended by the Senate. (Compare H.R. 15567 approved by the House on June 5, 1914 with H.R. 15567 approved by the Senate on September 2, 1914.) The Congressional Record reports no mention of Rep. Floyd's early view in any of the debates in either the House or the Senate. It is well-established that casual remarks of a single legislator occurring during the hearing process are entitled to little weight. (See *CIA Petrolera Caribe, Inc. v. ARCO Caribbean, Inc., supra*, 754 F.2d at 425; *Duplex Co. v. Deering, supra*, 254 U.S. 443, 474 (interpreting §§ 1 & 20 of the Clayton Act); *Aldridge v. Williams*, 3 How. 9, 24 (1845); *United*

committee members during the House hearings regarding whether individuals should be given the right to obtain the dissolution of an offending corporation cast even greater doubt on the Ninth Circuit's conclusion. (See, e.g. House Hearings at 492 (February 12, 1914); *id.*, at 666 (Feb. 16); *id.*, at 1183 (March 4); see also, 754 F.2d at 425-28.) In the words of Areeda & Turner:

> "That fragment of legislative history cannot bear the weight the court placed upon it [in *IT&T*], when the reports of the relevant House and Senate committees were silent on the point, which also did not appear to have been mentioned on the House or Senate floor." (2 P. Areeda & D. Turner, Antitrust Law, 328b (1978).)[19]

At worst, the legislative history of section 16 is inconclusive on whether Congress intended to afford private litigants the remedy of divestiture. At best, it shows Congress' intent to allow private parties the same remedies as the Government. In light of the unqualified language of section 16, coupled with the important role divestiture plays in achieving the purposes of the Sherman and Clayton Acts, this Court should reject the Ninth

States v. Union Pacific R.R. Co., 91 U.S. 72, 79; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 318.)

19. But the floor debates in the Senate *did* contain unequivocal statements of the intent to provide private litigants with the same remedies available to the government. (See note 16 and accompanying text, *supra*.) The Court should thus reject the Ninth Circuit's no-divestiture rule as inconsistent with the legislative history of the Clayton Act.

Circuit's holding that section 16 does not authorize district courts to utilize the most effective relief available to remedy violations of section 7 of the Clayton Act.

CONCLUSION

The decision below threatens to render the private action a dead letter in enforcing section 7 of the Clayton Act. That is wholly inconsistent with the plain language of section 16, the purpose of section 16 and its legislative history. Because the Court of Appeals' holding lacks doctrinal support and threatens California consumers with irreparable injury, the decision below should be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General
ANDREA SHERIDAN ORDIN,
Chief Assistant Attorney General
MICHAEL J. STRUMWASSER,
Special Assistant Attorney General
SANFORD N. GRUSKIN,
Assistant Attorney General
*H. CHESTER HORN, JR.,
LAWRENCE R. TAPPER,
Deputy Attorneys General

Attorneys for Petitioner

November 16, 1989 **Counsel of Record*

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On November 17, 1989, I served the within Brief for the Petitioner in re: "State of California -v- American Stores Co. Alpha Beta acquisition" in the United States Supreme Court, October Term 1989 No. 89-258, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Rex E. Lee
1722 Eye Street
Washington, D.C. 20006

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 17, 1989, at Los Angeles, California.

Donna R. Rodgers

DONNA R. RODGERS